

## **REMARKS**

Claims 1-53 are pending in the case, claims 20-53 apparently having been withdrawn through restriction. Despite having previously examined every one of the pending claims, the Office has apparently withdrawn claims 20-53 and examined only claims 1-19. The Office rejected claims 1-19 as follows:

- claims 1-4, 9-10, 14-15, and 17-18 as anticipated under 35 U.S.C. §102(e) by U.S. Letters Patent 6,010,139 (“Heyring et al.”);
- claim 5 as obvious under 35 U.S.C. §103(a) over Heyring et al. in combination with U.S. Publication No. 2003/0001734 (“Schofield”);<sup>1</sup>
- claims 6 and 15 as obvious under 35 U.S.C. §103(a) over Heyring et al. in combination with U.S. Patent No. 6,267,196 (“Wilcox”);
- claims 7-9, 13, 16 and 19 as obvious under 35 U.S.C. §103(a) over Heyring et al. in combination with U.S. Patent No. 4,313,511 (“Soo Hoo”); and
- claims 11-12 as obvious under 35 U.S.C. §103(a) over Heyring et al. in combination with U.S. Patent No. 4,243,278 (“Horan”).

Applicant traverses each of the rejections.

### **I. INFORMALITIES**

The Office has not formally withdrawn the previous rejections that were the subject of appeal. However, none of these rejections were iterated, or even addressed, in the present Office Action. Applicants therefore presume that those rejections have been successfully overcome and withdrawn. Applicants request notice should this presumption be incorrect.

The Office apparently seeks to construe certain statements made by Applicants as admissions that might be used against Applicants in the future. However, the Office’s construction is unclear, and Applicant reserves the right to contest the allegation of admission until such time the allegation is clarified and applied against Applicants. In particular, Applicants “admitted” that a vehicle has a “state”, and that such a “state” is a “fundamental fact

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<sup>1</sup> Applicants do not concede the status of Schofield as “prior art”. Schofield does not actually qualify as prior art under any provision of 35 U.S.C. §102. The Office may nevertheless cite Schofield under the legal fiction that it evidences what was “known by others” under 35 U.S.C. §102(a) on the assumption that Applicants’ data of

of existence.” Applicant stands by this statement, but would challenge any allegation of “admission” that would extend or apply that statement beyond what was actually made—*i.e.*, that a vehicle has a state of existence. The Office’s allegation of admission with respect to damping and articulation is treated below where it has actually been applied to the present claims.

## **II. THE RESTRICTION IS IMPROPER**

The present restriction flouts the Office policy of compact prosecution. While it is true that the timing of restriction is fairly flexible, “...The examiner should make a proper requirement as early as possible in the prosecution, in the first action if possible, otherwise, as soon as the need for a proper requirement develops.” M.P.E.P. §811. The present case has already been through two Office Actions and an Appeal in which all 53 claims have been thoroughly examined. Furthermore, there was nothing in the appeal that would lead to a “development” changing the propriety of restriction. Accordingly, the present restriction clearly has not been made “as early as possible in the prosecution.”<sup>2</sup>

Regardless of the timing, the Office’s assertion of “additional undue burden” is repudiated by the Office’s own actions on the record. The Office twice proposed restriction earlier in the prosecution. Neither restriction requirement was made final, and the Office proceeded to examine the entire case on both occasions without regard to the proposed restriction. Indeed, every claim in the case has already been twice examined and appealed. Whatever *pro forma* reasons the Office might be able to propose through use of form language, the Office’s actions clearly refute them.

Finally, the restriction is predicated on a requirement proposed in the Office Action dated October 24, 2007. In that Office Action, the Office nevertheless examined all 53 claims in the case. As noted in the preceding paragraph, this completely refutes or negates the Office’s allegation of “undue burden” absent restriction since it has already taken up the whole burden. But, more importantly, it actually moots the restriction requirement. Thus, the Office is now acting upon a moot requirement that is no longer viable. The restriction is therefore improper.

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invention is their date of filing. Applicants reserve the right to “swear behind” Schofield at a future date should they choose to do so. See M.P.E.P. §2132.91.

<sup>2</sup> Applicants note that the Office twice proposed restriction earlier in the prosecution of the application, but never made the restriction requirements final. However, these restriction requirements were mooted by the Office’s decision to examine all claims in the application all the way through to appeal.

### III. SUBSTANTIVE MATTERS

#### A. CLAIMS 1-4, 9-10, 14-15, AND 17-18 ARE NOVEL OVER HEYRING ET AL

The Office rejected claims 1-4, 9-10, 14-15, and 17-18 as anticipated under 35 U.S.C. §102(e) by U.S. Letters Patent 6,010,139 (“Heyring et al.”). An anticipating reference, by definition, must disclose every limitation of the rejected claim in the same relationship to one another as set forth in the claim. M.P.E.P. § 2131; *In re Bond*, 15 U.S.P.Q.2d (BNA) 1566, 1567 (Fed. Cir. 1990). Of these claims, only claim 1 is independent, and it recites “determining at least one dynamic property of the vehicle”. Claims 2-4, 9-10, 14-15, and 17-18 incorporate this limitation by operation of law. 35 U.S.C. §112, ¶4. Heyring et al. fails to disclose this limitation.

More particularly, the suspension system reacts to a change in a dynamic property but does not determine what that dynamic property is. This is most evident from the passage found at col. 5, lines 17-31, which reads:

Each pair of conduits and the front and rear wheel rams interconnected thereby constituting a respective closed circuit whereby first and second closed circuits are formed, and a pressure distribution means interposed between the first and second closed circuits and adapted to substantially achieve pressure equilibrium between said closed circuits, said pressure distribution means comprising two primary pressure chambers, each divided into two secondary pressure chambers by piston means, the piston means of said primary chambers being operatively interconnected to transfer motion therebetween, and permit controlled independent motion to vary the relative position of the piston means in said primary pressure chamber, said controlled independent movement maintaining said substantial pressure equilibrium and permitting additional controlled pitch resilience.

Thus, the suspension system of Heyring et al. simply maintains an even balance of pressure and does not in any way care from where any imbalance might originate. The actual dynamic characteristic that is involved is immaterial.

The Office alleges that a single passage of Heyring et al. teaches all the limitations of the claim, including the subject one. The Office relies on is col. 2 line 58 to col. 3, line 16, which read:

In order to contain high roll forces resulting from a high centre of gravity with respect to the relatively closely located rams (in the transverse direction), it is necessary to supply rams with a greater difference in rod and bore diameters. This therefore may automatically generate an unnecessary amount of pitch resistance or control in the longitudinal direction and this can lead to harshness of ride quality in some conditions. In particular it has been found that while body disturbance due to axle articulation movements and single wheel inputs is minimised, road surfaces that give rise to double wheel inputs on a single axle (such as 'speed humps') or sinusoidal road profiles can upset the previously disclosed suspension system. Typically this occurs when a vehicle's wheel base length approximates to half of the spacing of the humps disposed along the road surface. In order to traverse this kind of road surface smoothly (without excessive pitch motions being induced) both axles need to become independent in their motion, however the previously disclosed interrelated hydropneumatic system interprets these motions as high speed pitch movements and therefore attempts to resist them as though they were unwanted pitch motions. This type of high speed pitch resistance and over compensation manifests itself as an inappropriate pitch harshness which can become additionally uncomfortable when the vehicle moves over repeated bumps or dips causing increasingly exaggerated and inappropriate resonant responses.

Note that there is no discussion of “determining at least one dynamic property of the vehicle”—this passage merely discusses how to mitigate adverse performance in pitch and roll.

Furthermore, with respect to the rejection of claim 14, the Office relies on a misconstruction of Applicants Appeal Brief. The Office takes a passage out of its context and then misconstrues it in a manner supporting a rejection it would like to make. More particularly, in Applicants' Appeal Brief, at p. 12, lines 7-16, stated:

However, Applicants respectfully submit that sufficient disclosure has been provided that those skilled in the art will readily be able to ascertain how to “determine a damping scenario”. Applicants provide a great deal of information about how the articulation of the suspension system can be dampened as a part of the articulation. (¶[0064]- ¶[0078]) Applicants also provide a great deal of information as to how the suspension may be articulated as the vehicle crosses both smooth and rough terrain. (¶[0097]- ¶[0113]) Since damping is a part of articulation and both damping and articulation have been thoroughly disclosed, those of ordinary skill in the art will certainly be able to tell what it means to “determine a damping scenario”. Indeed, two specific examples

are actually provided in **FIG. 11** and **FIG. 12** and are discussed in ¶[0097]-¶[0113].

Applicants were therefore explaining that, *in their disclosed embodiment*, damping is a part of articulation and that both are adequately disclosed. However, the Office erroneously warps this into a generalized admission that damping is inherently a part of articulation. Applicants said no such thing and such a construction is clearly erroneous when the statement is considered in its context.

Thus, Heyring et al. fails to teach “determining at least one dynamic property of the vehicle”. As is established above, Heyring et al. only reacts to an adverse performance condition and takes no note of what dynamic property causes it. This has important, real world distinction because Heyring et al. cannot act proactively, whereas the claimed method can in some embodiments. (see ¶[0110]-¶[0113] of the application as published) Heyring et al. therefore fails to anticipate any of claims 1-4, 9-10, 14-15, and 17-18. M.P.E.P. § 2131; *In re Bond*, 15 U.S.P.Q.2d (BNA) 1566, 1567 (Fed. Cir. 1990).

## **B. ALL REMAINING CLAIMS ARE UNOBVIOUS OVER THE ART OF RECORD**

The remaining rejections are all for obviousness, and all of them rely on U.S. Letters Patent 6,010,139 (“Heyring et al.”) as the primary reference. More particularly, the remaining rejections are:

- claim 5 as obvious under 35 U.S.C. §103(a) over Heyring et al. in combination with U.S. Publication No. 2003/0001734 (“Schofield”);
- claims 6 and 15 as obvious under 35 U.S.C. §103(a) over Heyring et al. in combination with U.S. Patent No. 6,267,196 (“Wilcox”);
- claims 7-9, 13, 16 and 19 as obvious under 35 U.S.C. §103(a) over Heyring et al. in combination with U.S. Patent No. 4,313,511 (“Soo Hoo”);
- claims 11-12 as obvious under 35 U.S.C. §103(a) over Heyring et al. in combination with U.S. Patent No. 4,243,278 (“Horan”);

To establish a *prima facie* case of obviousness, the prior art reference (or references when combined) must teach or suggest all the claim limitations. M.P.E.P. § 706.02(j); *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (CCPA 1974).

Each of these rejections relies upon Heyring et al. to teach all the limitations of independent claim 1—*i.e.*, to anticipate claim 1. As is established above, Heyring et al. fails to do so. Heyring et al. fails to teach or suggest “determining at least one dynamic property of the vehicle” as is recited in claim 1. Claims 5-9, 11-13, 15-16, and 19, incorporate this limitation by operation of law. 35 U.S.C. §112, ¶4. Accordingly, the art of record fails to render obvious any claim in the case because it fails to teach or suggest all the limitations of the claims. M.P.E.P. § 706.02(j); *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (CCPA 1974).

#### **IV. CONCLUDING REMARKS**

Applicants respectfully submit that all claims are in condition for allowance. This includes the independent linking claims, meaning the unelected groups must be rejoined and allowed.

The Examiner is invited to contact the undersigned attorney at (713) 934-4053 with any questions, comments or suggestions relating to the referenced patent application.

Respectfully submitted,

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